UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

DAVID L. SMITH,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA; COMMISSIONER OF INTERNAL REVENUE; HARRY T. MANAKA; DIANE M. PHILLIPS; GARY T. EASLEY,

Defendants-Appellees.

Filed July 6, 2009

No. 08-1418
(D.C. No.1:07-CV-00876-BSJ)
(D. Colo.)

ORDER AND JUDGMENT[1]

Before **BRISCOE, MCKAY,** and **ANDERSON,** Circuit Judges.

David Lee Smith, an attorney who frequently and unsuccessfully litigates on his own behalf, challenges the dismissal of his adversary proceeding against the United States, the Internal Revenue

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[1]After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Service (IRS), and individual IRS employees.[2] We dismiss the matter for Mr. Smith's failure to pay the sanctions we imposed in *Smith v. C.I.R.*, 160 F. App'x 666, 670 (10th Cir. 2005).

Mr. Smith and M. Julia Hook (Mr. Smith's wife) filed an adversary proceeding in their Chapter 11 bankruptcy case asserting wrongful assessment and collection of their federal income taxes. In their complaint, they sought a declaratory judgment, injunctive relief, economic damages, and punitive damages. For numerous reasons, the bankruptcy court dismissed each of their claims and the district court affirmed. Mr. Smith has appealed.[3]

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[2]In this court alone, Mr. Smith's cases include: *In re Smith*, No. 08-1323, 2009 WL 1303165 (10th Cir. May 12, 2009) (affirming denial of reinstatement to the bar of the United States District Court for the District of Colorado); *In re Smith*, 287 F. App'x 683, 684 (10th Cir. 2008) (affirming dismissal of bankruptcy adversary proceeding seeking restoration of privileges as a licensed Colorado attorney); *Smith v. Seymour*, 229 F. App'x 811, 812 (10th Cir. 2007) (affirming dismissal of complaint against judges of this court, the clerk of this court, other courts involved in disciplinary decisions, a justice of the Colorado Supreme Court, and his attorney in disciplinary proceedings); *Smith v. C.I.R.*, 160 F. App'x 666, 668-70 (10th Cir. 2005) (affirming United States Tax Court' denial of his motions for leave to file motions to vacate or revise and imposing monetary sanctions); *Smith v. Figa & Burns*, 69 F. App'x 922, 926 (10th Cir. 2003) (dismissing appeal filed by Smith's wife concerning his malpractice claims and affirming district court's judgment on the couple's remaining claims); *Marks v. U.S. West Direct*, No. 98-1043, 1998 WL 856139, *1 (10th Cir. Dec. 11, 1998) (dismissing Smith's nonparty appeal for lack of standing); *In re Smith*, 10 F.3d 723, 724 (10th Cir. 1993) (suspending Mr. Smith "from the practice of law before this court until all sanctions are paid").

This court, however, previously imposed sanctions for Mr. Smith's "blatant waste of judicial time and resources" in pursuing a frivolous appeal. *Id.* We ordered Mr. Smith to pay $6,000 to the Commissioner of Internal Revenue for costs incurred in defending against a frivolous appeal. *Id.*[4] The brief filed in this case by the Tax Division, Department of Justice, states that its records do not reflect payment of this amount. Mr. Smith does not contend otherwise. Rather, he asserts that he listed the sanction amount in his bankruptcy case as a disputed claim, but the Commissioner failed to pursue the claim. He also argues that tax collection procedures have interfered with his ability to pay the sanction.

Mr. Smith's underlying Chapter 11 bankruptcy case was dismissed in August 2008 for failure to file an acceptable plan within a reasonable time. *Smith v. Colo. Dep't of Revenue (In re Hook),* BAP No. CO-07-106 (B.A.P. 10 Cir. Aug. 26, 2008) (unpublished). By statute, dismissal of a bankruptcy case returns the interests of a debtor and his creditors to their status before filing the case. *See* 11 U.S.C. § 349(b)(3) (dismissal "revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case under this title"). Mr. Smith's listing of the sanction amount in his bankruptcy proceeding

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[3]Ms. Hook is not a party to this appeal. After her motion to dismiss the appeal was granted, the case has proceeded with Mr. Smith as the sole appellant.

[4]Mr. Smith and Ms. Hook were found jointly and severally liable for payment of the sanctions. *Smith,* 160 F. App'x at 670.

ceased to have any legal effect after the Bankruptcy Appellate Panel affirmed the dismissal. Moreover, we are not persuaded that financial difficulties arising from the government's tax-collection efforts excuse his nonpayment.

"Courts have inherent power to dismiss actions for nonpayment of costs in prior actions. This power also extends to a litigant's failure to pay previously imposed sanctions." *Hymes v. United States,* 993 F.2d 701, 702 (9th Cir. 1993), *on reconsideration,* No. 91-35888, 1993 WL 259483 (9th Cir. 1993) (citations omitted). As the Second Circuit has explained, sanctions act as "a warning to a vexatious litigant (and others contemplating frivolous appeals) that the processes of a court may not be abused with impunity in the future." *Schiff v. Simon & Schuster, Inc.,* 766 F.2d 61, 62 (2d cir. 1985) (*per curiam*). "To make the sanction effective and thereby protect the processes of a court from abuse, a litigant against whom . . . sanctions have been imposed must comply with those sanctions before being permitted to pursue new matters in that court." *Id.; see also Mann v. Boatright,* 477 F.3d 1140, 1150 (10th Cir. 2007) (precluding litigant from pursuing additional appeals until providing proof of compliance with previously imposed sanctions).

Because Mr. Smith has not complied with our order requiring him to pay $6,000 to the Commissioner, we DISMISS this appeal.

Entered for the Court

Monroe G. McKay
Circuit Judge

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

DAVID L. SMITH,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA; COMMISSIONER OF INTERNAL REVENUE; HARRY T. MANAKA; DIANE M. PHILLIPS; GARY T. EASLEY,

Defendants-Appellees.

Filed August 6, 2009

No. 08-1418

ORDER

Before **BRISCOE, MCKAY,** and **ANDERSON,** Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court

requested that the court be polled, that petition is also denied.

Entered for the Court

ELISABETH A. SHUMAKER,
Clerk

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

DAVID LEE SMITH, Filed December 6, 2005

Petitioner-Appellant,

v. Nos. 04-9009 & 04-9010

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

The opinion of the court was delivered by: John C. Porfilio Circuit Judge

ORDER AND JUDGMENT[5]

Before **LUCERO, PORFILIO,** and **ANDERSON,** Circuit Judges.

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[5]This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

In these appeals, David Lee Smith asserts that the United States Tax Court erred in denying his motions for leave to file motions to vacate or revise that court's earlier decisions. We affirm, and we deny Smith's motions for recusal of this court and his motion for attorney fees. We grant the government's motion for sanctions.

Motions to Recuse

First, we address Mr. Smith's motion and supplemental motion for recusal and disqualification of the entire United States Court of Appeals for the Tenth Circuit. Federal judges have a "duty to sit" on cases filed with the court." *Switzer .v Berry,* 198 F.3d 1255, 1257 (10th Cir. 2000). Recusal of a judge is not "mandated upon the merest unsubstantiated suggestion of personal bias or prejudice." *Id.* at 1258 (quotations omitted). In *Switzer,* we applied these principles and held that " a lawsuit brought indiscriminately against all active and senior judges on the Tenth Circuit Court of Appeals does not operate automatically to render the court unable to hear and decide an appeal brought by the plaintiff/petitioner." *Id.*

Mr. Smith, an attorney, has a lengthy history with this court. Due to his pattern of abusive pro se litigation, the Tenth Circuit has enjoined his "proceeding as an appellant, or as a petitioner in an original proceeding, without the representation of a licensed attorney admitted to practice in this court, unless he first obtains permission to proceed pro se." *Howard v. Mail-Well Envelope Co.*, 150 F.3d 1227, 1232 (10th Cir. 1998). There is no restriction on Mr. Smith's proceeding as a represented litigant in this court.

Also, Mr. Smith has been disbarred from the practice of law in the Tenth Circuit for violating a prior suspension order and for practicing without authorization. *In re Smith*, 76 F.3d 335, 336 (10th Cir. 1996); *see also In re Smith*, 10 F.3d 723, 724 (10th Cir. 1993) (suspending Mr. Smith from practicing law in the Tenth Circuit). According to Mr. Smith, the United States Court of Appeals for the Fifth Circuit, the United States District Court for the District of Colorado, the United States District Court for the Northern District of Texas, and the Colorado Supreme Court have also suspended or disbarred him, based on the Tenth Circuit's rulings. Supp'l Mot. At 2-3.

Mr. Smith has filed a complaint in the district court pursuant to 42 U.S.C. § 1983, naming as defendants eleven active and senior judges of the United States Court of Appeals for the Tenth and Fifth Circuits, the Clerk of the Court for the Tenth Circuit Court of Appeals, several judges of the United States District Courts of Colorado and the

Northern District of Texas, a Colorado attorney, and the Chief Justice of the Colorado Supreme Court. The district court dismissed the action and Mr. Smith filed an appeal. That appeal, *Smith v. Seymour,* No. 05-1032 (10th Cir., filed Jan. 1, 2005), is pending in this court. No member of this panel is named as a defendant/appellee in Mr. Smith's current appeal.

Mr. Smith assumes, but does not show, prejudice or even a fact from which the appearance of prejudice might arise. Neither this court's enforcement of sanctions against him nor his action against other judges disqualifies this panel from hearing and resolving this appeal. Mr. Smith's motions are denied.

Tax Court's Dismissal of Motions to Vacate or Revise Decision

In the summer of 2000, Mr. Smith and his spouse, Mary Julia Hook, who is also an attorney, filed a petition with the United States Tax Court seeking a redetermination of assessed deficiencies in their federal income tax liabilities for 1992, 1993, and 1994 (Case I). Two years later, Mr. Smith and Ms. Hook filed another petition seeking a redetermination of deficiencies for 1995 and 1996 (Case II). This court has described the Tax Court litigation:

Case I was originally set for trial on September 10, 2001, but was continued, at Taxpayers' request, after a hearing. Following four days of trial between

May 2, 2002, and August 19, 2002, several additional continuances at [T]axpayers' request and the consolidation of the first case with the more recently filed second case. Taxpayers failed to appear at the resumption of the trial scheduled for May 19, 2003. Taxpayers had filed an emergency motion to strike and reset the trial date on May 16, 2003. Taxpayers neglected to notify their ten witnesses under subpoena who did appear at the trial setting along with one witness on behalf of the Commissioner. Ms. Hook claims that she and her husband missed the trial setting because "they were both very, very sick." After permitting the taxpayers to show cause, the tax court then dismissed the consolidated cases for failure to properly prosecute, and entered a decision in the amounts requested by the Commissioner for each year.

Hook v. Comm'r, 103 Fed. App'x. 661, 662-63 (10th Cir. July 13, 2004) (unpublished) (citations omitted).

Ms. Hook, but not Mr. Smith, appealed the dismissal. In the course of resolving the appeal, this court observed that "[n]o court, including the tax court, is required to tolerate conduct that disrupts the orderly administration of justice and hinders the court's management of its docket." *Id.* at 663. We concluded that the Tax Court did not abuse its discretion in dismissing the cases for failure to prosecute. *Id.* at 664.

After this court affirmed the judgment against Ms. Hook on appeal, Mr. Smith filed motions in the two Tax Court cases for leave to vacate or revise its

decisions with regard to his interests. The Tax Court promptly denied the motions by imprint stamp, without comment. Mr. Smith, who is being represented by Ms. Hook in this court, then filed a notice of appeal from the denial of his motion in each of the case. The appeals have been consolidated for procedural purposes only.

A Tax Court decision normally becomes final ninety days after entry if no party files a notice of appeal. *See* 26 U.S.C. §§ 7481(a)(1), 7483. And, "as a general rule, the Tax Court lacks jurisdiction to vacate a decision once it becomes final." *Davenport Recycling Assocs. V. Comm'r*, 220 F.3d 1255, 1259 (11th Cir. 2000) (collecting cases). Our sister circuits, however, have recognized an exception to the rule in instances of fraud on the court. *Id.*; *see also Drobny v. Comm'r*, 113 F.3d 670, 677 (7th Cir. 1997) (allowing a narrow exception to the rule of finality "if the party seeking to vacate the decision could convincingly establish that the decision resulted from a fraud on the court") (quotation omitted); *Billingsley v. Comm'r*, 868 F.2d 1081, 1085 (9th Cir. 1989) (acknowledging Tax Court jurisdiction to entertain a motion to vacate at any time if the decision was obtained by fraud on the court).

In the Tax Court, Mr. Smith alleged that the dismissal orders were based on "false and defamatory" charges, which "constituted a fraud on petitioners and the Court." R., Vo. I, Doc. 32-A at 2 (Case II); *id.* at vol. VI, Doc. 90-A at 2 (Case I). Accordingly, we conclude that the Tax Court had jurisdiction to deny the motions to vacate.

We therefore proceed to the only substantive issue in this case: whether these rulings amounted to an abuse of discretion. *See Davenport Recycling Assocs.*, 220 F.3d at 1258 (collecting cases applying the abuse-of-discretion standard to the Tax Court's denial of leave to file a motion to vacate). The "high" standard for abuse of discretion requires a showing of "an arbitrary, capricious, whimsical, or manifestly unreasonable judgment." *Schrier v. Univ. of Colo.*, No. 03-1275, 2005 WL 2902586, at *3 (10th Cir. Oct. 31, 2005) (quotation omitted). Based on the record before us, we discern absolutely no abuse of discretion in the denial of Mr. Smith's motions to vacate.

Motions for Sanctions

The Commissioner has moved for an order requiring Mr. Smith and Ms. Hook to pay sanctions in the amount of $6,000 for bringing and maintaining a groundless appeal. Mr. Smith has opposed the motion and countered with a request for sanctions against the government for $2,880 in attorney fees attributable to responding to the Commissioner's motion.

This court has the authority to impose sanctions: "to deter frivolous and abusive litigation and promote justice and judicial efficiency, the federal courts are empowered to impose monetary sanctions, by statutes and the rules of civil and appellate procedure as well as their inherent right to manage their own proceedings." *Braley v. Campbell*, 832

F.2d 1504, 1510 (10th Cir. 1987); *see also* Fed. R. App. P. 38 ("If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.") In an appropriate case, Rule 38 permits sanctions against attorneys as well as parties, if an attorney has brought a truly frivolous appeal on behalf of a client. *Braley*, 832 F.2d at 1511. "An appeal is frivolous when the result is obvious, or the appellant's arguments of error are wholly without merit." *Id.* at 1510 (quotation omitted).

When a court is considering the imposition of sanctions under Rule 38, due process requires that notice and an opportunity to be heard be given to the persons against whom sanctions are requested. *Id.* at 1514. Due process requirements are satisfied if the party seeking sanctions files a separate motion for sanctions and the party against whom sanctions are sought has "the opportunity to file a brief or otherwise be heard." *Id.* at 1515.

An unvarnished recitation of the steps leading to Mr. Smith's appeal demonstrates its frivolousness. He and Ms. Hook were co-petitioners in the dismissed Tax Court cases. Only Ms. Hook timely appealed the dismissals. In Ms. Hook's appeal, this court summarily affirmed the Tax Court's actions. *Hook*, 103 Fed. Appx. at 664. Mr. Smith then asked the Tax Court for leave to vacate or revise its just-affirmed decisions. The Tax Court denied his

motions. Mr. Smith, represented by Ms. Hook, appealed to this court.

For this blatant waste of judicial time and resources, sanctions are appropriate. Because the Commissioner filed a separate motion for sanctions (with documentation of the average expense in attorney salaries and costs incurred in defense of frivolous taxpayer appeals) and Mr. Smith responded in opposition to the motion, due process considerations have been met. We grant the Commissioner's motion and order Mr. Smith and Ms. Hook, jointly and severally, to pay the lump sum of $6,000 to the Commissioner. For obvious reasons, we deny Mr. Smith's counter-motion for attorney fees.

The judgment of the United States Tax Court is AFFIRMED. Mr. Smith's motions for recusal of this court are DENIED. The Commissioner's motion for sanctions is GRANTED; Mr. Smith's motion for sanctions is DENIED.